Yip Shou Shan v Majlis Peguam

SUPREME COURT (KUALA LUMPUR) — CIVIL APPEAL NO 02-161-94
JEMURI SERJAN CJ (BORNEO), EDGAR JOSEPH JR AND EUSOFF CHIN SCJJ
23 MAY 1994

Legal Profession *— Sijil annual — Failure to submit clean accountant's report of previous firm —Refusal of Bar Council to issue sijil or grant exemption — Whether Bar Council had discretion to refuse application — Duty of Bar Council — Legal Profession Act 1976 s 32 — Accountant's Report Rules 1978 r 6*

Legal Profession *— Practice of law — Partnership — Duty of partner*

The Bar Council refused the appellant's application for a sijil annual for 1994 under s 32 of the Legal Profession Act 1976 ('the Act') as the appellant had failed to submit a clean accountant's report for 1990 in respect of his former practice ('the firm') where he had been a partner. The Bar Council also refused to grant him an exemption under r 6 of the Accountant's Report Rules 1978. Earlier however, pending the submission of a clean accountant's report, the Bar Council had issued the sijil annual for 1992 and 1993 on the security of a sum which reflected the amount that could not be reconciled in the accounts of the firm.

The appellant applied to the High Court under s 34 of the Act for an order directing the Bar Council to issue him with the sijil annual on the grounds that: (i) since he had left the firm, his former partners should be responsible for the finalization of its accounts; and (ii) so long as an accountant's report was submitted under s 32(2) of the Act, the Bar Council could not refuse to issue the sijil annual because this would amount to suspending him from practice, ie a power given only to the Chief Justice. The appellant's application to the High Court was dismissed. [See [1994] 2 MLJ 149.] The appellant has appealed.

Held, dismissing the appeal:

(1) The issuance of the sijil annual for 1992 and 1993 should not be treated as an exemption under r 6 of the Accountant's Report Rules 1978. The Bar Council was correct in refusing to grant an exception under r 6 as the case did not come within the rule and the deficiency in the clients' accounts was quite substantial.

(2) An advocate and solicitor is in a position of a trustee vis-a-vis his client's money and must produce a clean accountant's report of all moneys handled by any office of his partnership. He must ensure that the partnership accounts are in order at all times, especially before leaving the partnership or before it is wound up.

(3) Section 32 of the Act imposes a duty on the Bar Council to scrutinize every application for a sijil annual and to ensure that only honest and trustworthy advocates and solicitors are allowed to practise. It has the discretion to refuse to issue a sijil annual where an advocate and solicitor cannot deliver a clean accountant's report or where it is in the public interest.

[Bahasa Malaysia summary

Majlis Peguam telah menolak permohonan perayu untuk mendapatkan suatu sijil annual untuk tahun 1994 di bawah s 32 Akta Profesion Undang-Undang 1976 ('Akta itu') kerana perayu telah gagal mengemukakan suatu laporan akauntan yang bersih untuk tahun 1990 berkenaan dengan amalannya yang dahulu ('firma itu') di mana beliau merupakan seorang rakan kongsi. Majlis Peguam juga enggan memberikan beliau suatu pengecualian di bawah k 6 Kaedah-Kaedah Laporan Akauntan 1978. Bagaimanapun, sebelum itu, semasa menunggu pengemukaan suatu laporan akauntan yang bersih, Majlis Peguam telah mengeluarkan sijil annual untuk tahun 1992 dan 1993 atas cagaran sejumlah wang yang mencerminkan jumlah yang tidak dapat diselaraskan di dalam akaun firma itu.

Perayu telah memohon kepada Mahkamah Tinggi di bawah s 34 Akta itu untuk mendapatkan suatu perintah yang mengarahkan Majlis Peguam supaya mengeluarkan sijil annual kepada beliau atas dasar bahawa: (i) oleh kerana beliau telah meninggalkan firma itu, bekas rakan kongsi beliau yang sepatutnya bertanggungjawab menyelesaikan akaunnya; dan (ii) selagi suatu laporan akauntan dikemukakan di bawah s 32(2) Akta itu, Majlis Peguam tidak dapat menolak permohonan untuk suatu sijil annual kerana akibatnya adalah sama seperti menggantungkan beliau daripada menjalankan amalannya, iaitu suatu kuasa yang hanya diberikan kepada Hakim Besar. Permohonan perayu ke Mahkamah Tinggi telah ditolak. [Lihat [1994] 2 MLJ 149.] Perayu telah membuat rayuan.

Diputuskan, menolak rayuan itu:

(1) Pengeluaran sijil annual untuk tahun 1992 dan 1993 tidak seharusnya disifatkan sebagai suatu pengecualian di bawah k 6 Kaedah-Kaedah Laporan Akauntan 1978. Majlis Peguam telah bertindak dengan betul apabila ia enggan memberikan suatu pengecualian di bawah k 6 kerana kes ini tidak termasuk di dalam lingkungan kaedah itu dan jumlah yang tidak dapat diselaraskan di dalam akaun klien adalah suatu jumlah yang cukup banyak.

(2) Seorang peguambela dan peguamcara terletak di dalam kedudukan seorang pemegang amanah berkenaan dengan wang kliennya dan mesti mengemukakan suatu laporan akauntan yang bersih mengenai semua wang yang dikendalikan oleh mana-mana pejabat perkongsiannya. Beliau mesti memastikan bahawa

akaun perkongsian itu adalah teratur pada setiap masa, terutamanya sebelum meninggalkan perkongsian itu atau sebelum ia digulung.

(3) Seksyen 32 Akta itu mengenakan suatu kewajipan ke atas Majlis Peguam untuk meneliti setiap permohonan untuk sijil annual dan memastikan bahawa hanya peguambela dan peguamcara yang jujur dan boleh dipercayai dibenarkan menjalankan amalan. Ia mempunyai budi bicara untuk menolak permohonan untuk sijil annual di mana seseorang peguambela dan peguamcara tidak dapat menyampaikan suatu laporan akauntan yang bersih atau di mana ianya adalah untuk kepentingan awam.]

Legislation referred to

Legal Profession Act 1976 ss 29, 32, 34, 79, 88A
Accountant's Report Rules 1978 r 6
Solicitors' Account Rules 1978

Appeal from: Originating Summons No 17–01–1994 (High Court, Kuala Lumpur)

G Sri Ram (*Benjamin Yean* with him) (*Liza Chan & Co*) for the appellant.

Tuan Haji Sulaiman (*Zain & Co*) for the respondent.

Eusoff Chin SCJ (delivering the grounds of judgment of the court): The appellant was admitted as an advocate and solicitor of the High Court on 17 November 1975. The Bar Council (the respondent) had refused under s 32 of the Legal Profession Act 1976 (hereinafter 'the Act'), to issue a sijil annual for the year 1994.

Under s 29 of the Act, the registrar of the High Court will not issue a practising certificate to an advocate and solicitor unless the advocate and solicitor submits to the registrar the last sijil annual issued to him by the Bar Council.

Under s 32 of the Act, the Bar Council is empowered to issue a sijil annual to an advocate and solicitor if his application complies with the requirements of that section. One of the requirements is that the advocate and solicitor must deliver with his application an accountant's report prepared in accordance with s 79 of the Act.

It was in 1985 when the appellant went into partnership with Margaret Yeo Eng Hong and Nasrim bin Dato' Salleh to establish a law firm called Yip Yeo and Nasrim in Petaling Jaya with a branch office in Kuala Lumpur. On 30 September 1990, the appellant left his firm, and practised under the name of Peter Yip & Young in Petaling Jaya.

In 1991, the appellant applied for a sijil annual for 1992. On 22 November 1991, the Bar Council asked the appellant for the accountant's report of Yip Yeo and Nasrim in respect of their Petaling Jaya and Kuala Lumpur offices for the period 1 January to 30 September 1990. The

A appellant replied that since he had left his former firm, he had no control over the auditing of the firm, and that his former partners should be responsible for the finalization of the accounts of that firm. The Bar Council wrote to the appellant and his former partners on 6 December 1991 advising them to meet and resolve all outstanding issues so that a clean accountant's report could be issued to enable them to obtain their sijil annual for 1992.

Following further correspondence, the appellant, Margaret Yeo and their auditor Christopher Chooi appeared before the sijil annual committee of the Bar Council on 15 January 1992 to give their views. Margaret Yeo said she was responsible only for the running of the Kuala Lumpur office of the firm and could produce the account of that office but was unable to produce the accounts for the Petaling Jaya office over which she had no control and the appellant was not co-operative. At the meeting, the committee was informed that an accounts clerk of the firm had paid in some of the clients' moneys. Their auditor told the committee that with the files made available to him, he still could not reconcile a figure amounting to RM341,095.30.

The respondent decided that the appellant be given up to 29 July 1992 to submit the accountant's report. However, the appellant required more time, and the date was extended to 31 December 1992. The appellant and Margaret Yeo agreed that auditors be appointed by the Bar Council to examine the accounts of the firm. Abu Bakar Rajuddin & Co was appointed as independent auditors for that purpose. The auditors asked for three months' extension beyond 31 December 1992. Meanwhile the Bar Council decided, in the circumstances, to issue the sijil annual for the years 1992 and 1993 to the appellant pending the production of the accountant's report.

There was no progress on the auditors' work, and the Bar Council agreed to the appointment of another firm of accountants, Messrs Monteiro and Heng, who started work in July 1993, and they were given up to 31 December 1993 to finish their report.

On 18 November 1993, the appellant made an application for a sijil annual for the year 1994.

On 30 December 1993, the Bar Council received Messrs Monteiro and Heng's report on the audit of the appellant's former firm at the Petaling Jaya office showing clients' accounts for the period 1 January to 30 September 1990. The report stated that on the dissolution of the firm on 30 September 1990, the appellant took some of the files while Margaret Yeo took other files. It also stated that the former partners had not complied with the Solicitors' Account Rules 1978. As at 1 January 1990, numerous clients' accounts were overdrawn amounting to RM1,000,648.61. The report concluded as follows:

> On completion of the audit examination of the accounting records of the abovestated firm and having enumerated the deficiencies and anomalies in the accounting system, I endeavoured to effect a reconciliation of the

clients' ledger balances with the bank balances as at 30 September 1990 resulting in a total deficiency in the clients' accounts of RM705,091.89. A

The Bar Council was shocked to see this report as the apparent deficiency in the accounts had risen tremendously from RM341,095.30 to RM705,091.89.

The Bar Council asked both the appellant and Margaret Yeo to explain how the shortfall came about so as to enable the Bar Council to consider whether or not to issue their sijil annual for 1994. B

The appellant could not offer any explanation as he said he had left the firm in 1990. He asked to meet the sijil annual committee which was agreed, and the meeting was held on 16 February 1994. The chairman of the committee explained that unless the appellant could produce a clean accountant's report, the Bar Council would not issue the sijil annual to the appellant for 1994. The appellant pleaded with the Bar Council to give him an exemption under r 6 of the Accountant's Report Rules 1978, but the appellant's case did not appear to fall under any of the conditions specified in r 6 which would enable the exemption to be granted. The fact that the sijil annual was issued for 1992 and 1993 should not be treated as an exemption under r 6 because the sijils were issued pending the completion of audit and submission of a clean report by the accountant for the period 1 January to 30 September 1990. C D

The evidence shows that the Bar Council had sent to every member of the Bar including the appellant a circular titled 'Application for sijil annual' on 4 January 1985, which reads: E

> Law firms may have branches. Obviously a partner of the main office would also be a partner of the branch and vice versa. In making your application for the sijil annual the accountant's certificate of the main office as well as the branches will have to be submitted. F
>
> Some members have argued that they are partners of branch office only and not the main office or vice versa and [are] therefore not required to submit the accountant's certificate in respect of offices where they claimed they do not have any interest. Such contention is not acceptable.
>
> The Bar Council hereby notify you that the above rule would [be] strictly observed when considering applications for the sijil annual 1986 and non-compliance will result in your application being rejected. G

We agree with the views expressed by the Bar Council that an advocate and solicitor is in a position of a trustee vis-a-vis his client's money and must therefore produce a clean accountant's report in respect of all moneys handled by any office of his partnership during any period for which he is a partner. The Bar Council is not concerned with the internal financial and other arrangements between partners inter se. It is up to every partner to ensure that the partnership accounts are in order at all times, in particular before leaving the partnership or before the partnership is wound up. H I

In the High Court and before us, the appellant's learned counsel argued that under s 32 of the Act, the Bar Council cannot insist on a clean

A accountant's report. So long as an accountant's report is submitted together with the application which complies with s 32(2) of the Act, the Bar Council must issue the sijil annual to the applicant. If the accountant's report shows that clients' moneys had not been accounted for, the Bar Council should apply ex parte under s 88A of the Act to the Chief Justice for an order suspending such advocate and solicitor from practice until B further order. The Bar Council cannot refuse to issue the sijil annual because this would amount to suspending the advocate and solicitor concerned from practice. The learned counsel submitted that the power to suspend is given only to the Chief Justice.

For ease of reference we quote the relevant provisions of ss 32 and C 88A of the Act:

> 32 Issue of Sijil Annual
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> (1) Subject to this section and sections 33 and 34, the Bar Council shall at any time after the month of June in the preceding year issue a Sijil Annual to an advocate and solicitor within twenty-one days D of the receipt of an application under subsection (2) if —
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> (a) the Bar Council is satisfied that the application complies with that subsection and any rules made under this section;
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> ...
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> (c) the advocate and solicitor has delivered or is exempted from E delivering an accountant's report in accordance with s 79; ...
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> 88A Suspension of advocate and solicitor
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> (1) Where an advocate and solicitor —
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> (a) has been found guilty by a court of law of any offence involving F dishonesty, misuse of his client's moneys or dishonesty towards a client or in respect of any property belonging to a client;
>
> ...
>
> (c) in respect of whom a complaint has been made to the Bar Council concerning any dishonest act or acts committed by G him in his capacity as an advocate and solicitor; ...
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> and the Bar Council considers that it would be in the public interest or in the interest of his clients or of the profession that such advocate and solicitor be suspended from practice, the Bar Council may apply by summons to the Chief Justice ex parte for an order suspending such advocate and solicitor from practice until further order.

H

We are of the view that s 32 of the Act imposes a duty on the Bar Council to process and scrutinize every application for a sijil annual. It is the Bar Council's paramount duty to ensure that only an honest, trustworthy, fit and proper advocate and solicitor should be allowed to practise. Any act of I dishonesty on the part of an advocate and solicitor would bring the Bar Council and the legal profession into disrepute. The issuance of a sijil annual by the Bar Council is its recommendation to the registrar that such advocate and solicitor is a fit person to be issued a practising certificate

under s 29 of the Act. If the Bar Council finds that an advocate and solicitor has failed to keep proper accounts of all moneys received by his firm and therefore he cannot deliver a clean accountant's report, the Bar Council is entitled to refuse to issue a sijil annual and consequently will not recommend to the registrar for the issuance of a practising certificate to the advocate and solicitor concerned. It is, therefore, clearly misconceived to interpret the role of the Bar Council as merely a rubber-stamping process, it having no discretion to refuse to issue a sijil annual in circumstances where clearly it should not be issued in the public interest. To agree with the appellant's argument would render s 34 *otiose* in its application to s 32, bearing in mind that s 32 is expressly subject to s 34.

> 34 Applicant to apply to Court.
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> (1) An advocate and solicitor who is required to make an application under this section or any advocate and solicitor who is dissatisfied with the refusal, neglect or delay in the issue to him of a Sijil Annual may apply to a Judge by originating summons for an order directing the Bar Council to issue him with a Sijil Annual.

The appellant's application to the High Court has been filed under s 34 of the Act and the High Court has refused to direct the Bar Council to issue the sijil annual. [See [1994] 2 MLJ 149.]

The fact that the Bar Council had issued sijils annual to the appellant for the years 1992 and 1993 does not mean that the Bar Council was satisfied with the accountant's report for the period 1 January to 30 September 1990. As earlier stated, the Bar Council did so to enable the appellant to continue practising while the firm's accounts were being audited. If, therefore, the Bar Council has erred, it has done so in favour of the appellant. On the facts, we are of the view that the Bar Council had acted fairly in this case by refusing to issue the sijil annual to the appellant for the year 1994. The appellant must submit an accountant's report showing that he had kept his accounts in accordance with the Solicitor's Account Rules 1978. The Bar Council was also correct in refusing to give an exemption from delivery of an accountant's report under r 6 of the Accountant's Report Rules 1978 simply because the appellant could not establish that his case comes within any of the matters enumerated under para (2) of that r 6. We also agree with the Bar Council that this is not a proper case to grant an exemption under r 6 because the deficiency in the clients' accounts of RM705,091.89 is quite substantial, notwithstanding that no clients of the appellant's former firm had made any complaint.

We, therefore, dismiss this appeal with costs.

Appeal dismissed.

Reported by Prof Ahmad Ibrahim